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YOLO COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, vs. **MARCO ANTONIO TOPETE,** Defendant.	Case No.: CR08-3355 Department No. 6 NOTICE OF MOTION AND MOTION TO APPLY THE WITT STANDARD FOR ADP JURORS AND THE WITHERSPOON STANDARD FOR SCRUPLED JURORS Trial Motion No. 3

TO: THE DISTRICT ATTORNEY OF YOLO COUNTY

PLEASE TAKE NOTICE that on May 17, 2010, or as soon thereafter as the matter may be heard, in Department 6 of the above entitled court, defendant, Marco Antonio Topete, by and through attorneys, Hayes H. Gable, III and Thomas A. Purtell will move the court for an order applying the Witherspoon v. Illinois (1968) 391 U.S. 510 standard to scrupled jurors and the Wainwright v. Witt (1985) 469 U.S. 412 standard to automatic death penalty jurors.

This motion is made on the grounds that this procedure is necessary to protect defendant's federal Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment constitutional rights, state Article I, sections 1, 7, 13, 15, 16, 17, and 27 constitutional rights and statutory rights.

This motion is based on this notice, the pleadings, records, and files in this action, the attached memorandum of points and authorities and oral argument to be presented at the hearing.

DATED: May , 2010

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YOLO COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, vs. **MARCO ANTONIO TOPETE,** Defendant.	Case No.: CR08-3355 Department No. 6 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO APPLY THE WITT STANDARD FOR ADP JURORS AND THE WITHERSPOON STANDARD FOR SCRUPLED JURORS

TO: THE DISTRICT ATTORNEY OF YOLO COUNTY

I.

THIS COURT SHOULD APPLY THE WITHERSPOON STANDARD FOR SCRUPLED JURORS AND THE WITT STANDARD FOR ADP JURORS.

The California Supreme Court has, in an unbroken line of decisions commencing with In re Anderson (1968) 69 Cal.2d 613, strictly adhered to the requirements of Witherspoon v. Illinois (1968) 391 U.S. 510. That standard provided that under the federal Constitution:

> The only prospective jurors who could constitutionally be excused for cause due to their opposition to or doubts about capital punishment were "those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*."

(Hovey v. Superior Court (1980) 28 Cal.3d 1, 10-11, quoting Witherspoon, *supra*, 391 U.S. at 522-523, fn. 21 [superseded by statute as stated in People v. Waidla (2000) 22 Cal. 4th 690, 713].)

It is assumed that the prosecution will argue that this court should depart from this time-honored standard in favor of the new standard announced in Wainwright v. Witt (1985) 469 U.S. 412. It also is assumed that this argument will be made on the ground that California's adherence to the Witherspoon standard was compelled by the federal Constitution; because it is now clear that the federal Constitution no longer mandates that strict standard, the Witt standard should apply. However, this argument neglects the requirements of the California Constitution and the doctrine of independent state grounds. (See, Raven v. Deukmejian (1990) 52 Cal.3d 336.)

As explained in Hovey, prior to Witherspoon there was an unresolved conflict in California law as to whether a standard similar to that of Witherspoon was required by applicable California statutes and provisions of the California Constitution. (Hovey, *supra,* 28 Cal.3d at 8-11.) Although the Hovey opinion does indicate that "[t]his apparent conflict was conclusively resolved" by the Witherspoon case, the context of that remark indicates that what was actually meant, in more precise terms, was that the conflict about the requirements of state law was rendered moot by Witherspoon. (Id. at 10.)

Clearly, the Witherspoon opinion neither could, nor did, address the requirements of California state law. Rather, under the Federal Supremacy Clause, there was no further reason after Witherspoon to continue to debate or determine whether state law mandated a strict Witherspoon-type standard. California was bound to follow the federal constitutional minimum set forth in Witherspoon in any event. If Witt has indeed substantially lowered the **federal** constitutional minimum standards for exclusion of death-scrupled jurors, the question of whether California state law compels a standard that is above or below that minimum, and what that standard is, once again becomes the controlling issue. (People v. Balderas (1985) 41 Cal.3d 144, 189-190, at fn. 18; People v. Allen (1986) 42 Cal.3d 1222, 1274-1276.)

Numerous pre-Witherspoon cases, upon which defendant relies, interpret state law as requiring a standard essentially identical to the federal standard under Witherspoon. (Hovey, *supra*, at 9-10; People v. Bandhauer (1967) 66 Cal.2d 524, 531; People v. Riser (1956) 47 Cal.2d 566, 575-576 [overruled on other grounds People v. Morse (1964) 60 Cal. 2d 631, 648-649]; People v. Rollins (1919) 179 Cal. 793, 796.) Defendant submits that these California cases mandate the application of a standard of scrupled juror exclusion equivalent to that of Witherspoon. These cases plainly and emphatically require the application of the Witherspoon standard. Thus, the Witherspoon standard should be applied during the voir dire of this case as to scrupled jurors.

The court in Witt derived the standard to be applied by the trial court from its opinion in Adams v. Texas (1980) 448 U.S. 38. While Adams still cited Witherspoon with approval, and held unconstitutional a Texas statute that disqualified jurors who could not swear that the fact that a case was capital "would not affect" their deliberations on any issue of fact, it did simplify and restate the applicable standard:

> This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment **unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his** instructions and his **oath**. The state may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

(Adams, *supra*, 448 U.S. at 45, emphasis added.) Witt adopted this standard, and noted the difficult task facing the trial court in applying the standard.

> The state of this case law leaves trial courts with the difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the laws to the facts adduced at trial.

(Witt, *supra*, 469 U.S. at 421.) The court distinguished this standard from that of Witherspoon as follows:

> The tests with respect to sentencing and guilt, originally in two prongs, have been merged; the requirement that a juror may be excluded only if he would never vote for the death penalty is now missing; gone too is the extremely high burden of proof. In general the standard has been simplified.

(Ibid.)

Thus, the court in Witt rejected Witherspoon's requirement that a juror must "automatically" vote against the death penalty in every case before he is excludable. This was because the juror's role under the "guided discretion" statutes that are now constitutionally mandated for implementing the death penalty is different than it was when the jury had unfettered discretion in choice of sentence, as was the case in Witherspoon. (Id. at 421-422.)

Noting that where there is unlimited discretion in the juror, all she/he need do to follow the law and abide by his/her oath is to "consider" the death penalty. However, under guided discretion statutes,

> [I]t does not make sense to require simply that a juror not "automatically" vote against the death penalty; whether or not a venireman *might* vote for death under

certain *personal* standards, the State still may properly challenge that venireman if he refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge.

(Id. at 422.)

The court concluded its formulation of the new standard in the following language: "That standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (Ibid.. at 424.)

It follows from this analysis that, under Witt, whether a juror is or is not qualified to sit in a capital case depends upon his ability to perform the duties required of him by the law governing the case. This in turn means that prior to making that determination, it must be clear both to the court and to the juror what the juror's duties are under the particular state's law. Under the California statutes, penalty jurors are invested with substantial discretion, which takes into account their personal views concerning the value of life and the appropriateness of the death penalty. Thus, in articulating the duty of a juror under California law, the Supreme Court in People v. Brown (1985) 40 Cal.3d 512 (overruled on another ground *sub nom* California v. Brown (1987) 479 U.S. 538, held as follows:

> We agree with defendant, therefore, that a statute would be invalid if interpreted to preclude juror consideration of any factors constitutionally relevant to imposition of the death penalty. Nor would a statute pass muster if it required jurors to render a death verdict on the basis of some arithmetical formula, **or if it forced them to impose death on any basis other than their own judgment that such a verdict was appropriate under all the facts and circumstances of the individual case.** [Footnote omitted.] We agree with the People, however, that the 1978 death penalty law need not, and should not, be so interpreted.

(Id. at 540, emphasis added.)

> Similarly, the reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate

> discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. **Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider,** including factor "k" as we have interpreted it. [Footnote omitted.] By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, **the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances**. Thus, the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

Id. at 541, emphasis added.)

> Nothing in the amended language limits **the jury's power to apply those factors as it chooses** in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole.

(Id.. at 544, emphasis added; see also: People v. Brasure (2008) 42 Cal.4th 1037, 1060-1066; People v. Bacigalupo (1993) 6 Cal. 4th 457, 470 ["Representing the community at large, the jury applies 'its own moral standards to the aggravating and mitigating evidence presented' and has the 'ultimate responsibility for determining if death is the appropriate penalty for the particular offense and offender.'"].) In Allen, the Supreme Court reiterated much of this same language in outlining the jury's proper role in determining punishment. (Allen, *supra*, 42 Cal.3d at 1257.)

Given this **duty** of each of the jurors to "weigh" the aggravating against the mitigating factors, assigning "whatever moral or sympathetic value he deems appropriate to each and all" of them, the juror who might find it difficult to impose a verdict of death because he/she values certain mitigating factors highly, given his/her own moral standards as to the value of life, would not be "substantially impaired" from performing his/her duty under the statute, that **is** his/her duty. Accordingly, in making determinations about whether particular prospective jurors are qualified to sit under the *Witt* standard, this court must take into consideration the jurors' duties

under the California statutes. Only if a juror's opinions about the death penalty are such that he/she would not be able to engage in the weighing process as described in *Brown* would he/she be disqualified from serving. Furthermore, prior to the actual voir dire questioning on the death penalty, prospective jurors must be informed that this is the scope of their duties before they can intelligently answer questions about whether their views on the death penalty would "substantially impair" their ability to perform those duties.

Since neither Witt nor Witherspoon address the exclusion of persons who would automatically impose the death penalty in every case,[1] the exclusion of the ADP group is required in California. (People v. Coleman (1988) 46 Cal. 3d 749, 765-768; People v. Hughes (1961) 57 Cal.2d 89, 94-95; People v. Gilbert (1965) 63 Cal.2d 690, 712, vacated and remanded on other grounds Gilbert v. California, (1967) 388 U.S. 263). Since Witt, by reference, lessens, but does not create a new, standard for the exclusion of ADP's, and the exclusion of ADP's in California is by state statute, under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 15, 16, and 17 of the California Constitution, the *Witt* standard as to ADP's should be applied.

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[1] In Hovey v. Superior Court (1980) 28 Cal.3d 1, the Supreme Court stated that "[t]he *Witherspoon* decision did not directly address whether the Constitution requires the exclusion of those who would automatically vote for the death penalty in every case." (*Id.* at 63-64, fn. 110.)

CONCLUSION

Therefore, this court should apply the Witt standard for ADP jurors and the Witherspoon standard for scrupled jurors.

DATED: May 17, 2010

Respectfully submitted,

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